Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant, by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN and EDWARD G. LINDBURG,
Plaintiffs-Petitioners,

—against—

TOWN OF ORANGETOWN and MAX FRIEDMAN,
Defendants-Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinions of the Court Below

The prevailing opinion was written by Augustus N. Hand, C.J., the dissenting opinion by Clark, C.J. They are not reported, except in the New York Law Journal, September 14, 1945. An opinion was written in the District Court by Moscowitz, D.J. (873-902), reported at 57 Fed. Supp. 52.

Jurisdiction

The decree of the Circuit Court of Appeals sought to be reviewed is dated July 16, 1945. The statutory authority under which jurisdiction is invoked is Judicial Code, Section 240, 28 U. S. C. Section 347.

Statement of the Case

The action is in negligence for the death of the intestate of Josh David Smith and for injuries to the other plaintiffs. Federal jurisdiction is based on diversity of citizenship (9).

At about 9:30 P. M. on November 22, 1943, defendant Friedman, driving his automobile, ran into the rear of a column of soldiers on a night-practice march between the Villages of Piermont and Sparkill, Rockland County, New York, killing Smith and injuring the others. The soldiers were from nearby Camp Shanks (362, 382-384, 656). Friedman, a policeman of the Town of Orangetown, was driving from Nyack to report to Police Headquarters at Sparkill in response to a practice air-raid black-out signal (160, 471-474, 524).

The complaint pleads that Friedman was driving negligently and recklessly and that the deceased and the injured men were free from contributory negligence (15, 18, 28, 31). These allegations are denied by defendants (58-62, 63, 78, 87-90). Each defendant also claims immunity under the New York State War Emergency Act, asserting that Friedman, in good faith, was carrying out a duly promulgated order in respect of civilian protection (80-82, 99-103).

A judgment for defendants was entered on a verdict

in their favor following a trial before Moscowitz, J., and a jury in the District Court, Southern District, New York. The Circuit Court of Appeals for the Second Circuit, with Clark, C.J. dissenting with an opinion, affirmed the judgment.

Specification of Errors

The District Court erred in his refusal to set aside the verdict of the jury (873, 901), and the Circuit Court of Appeals erred in its affirmance of that decision and of the judgment entered upon the verdict.

Summary of Argument

I

The Courts below erred in construing a war measure such as the New York War Emergency Statute, enacted for civilian protection, so as to grant immunity to reckless acts committed wantonly and in disregard of the rights and safety of others. Such construction, moreover, raises great doubt as to the statute's constitutionality.

II

The Trial Court erred in his charge to the jury as to (1) the issue of contributory negligence; (2) the effect of New York General Municipal Law, Section 50c; (3) the burden of proof on the issue of Friedman's good faith; and (4) the undue emphasis placed upon the fact that Friedman was responding to an air-raid black-out signal.

III

The Trial Court improperly interfered with plaintiffs' counsel's presentation of the case.

IV

Defendants' trial counsel improperly appealed to the prejudices of the jury in his summation.

V

The War Emergency Statute is not a defense to the action for the death of Smith in view of New York State Constitution, Article 1, Section 16.

POINT I.

War measures, such as the New York War Emergency Act, when properly construed, do not grant immunity for reckless conduct carried on in wanton disregard of the rights and safety of others. Although there was proof from which the jury could have found that Friedman so had acted, the Trial Court's charge erroneously required the jury to find for defendants merely because Friedman was responding to an air-raid signal. The construction thus placed upon the statute creates doubt as to its constitutionality.

The proof was such as to warrant the jury finding

that Friedman had been driving in a reckless manner. Upon air-raid practice black-outs, a "blue" alarm for putting out lights in houses first was sounded (245, 267, 268). Then came a "red" alarm upon which all street lights were put out and automobiles were required to turn off their lights and stop at one side of the road (270). On the occasion herein, the first alarm was sounded at 9:28 P. M. and the second at 9:37 P. M. (736, 747).

Friedman's orders were to report to Police Headquarters at Sparkill upon any black-out (732). He was in a drug store in Nyack on the night of November 22nd when he heard the first siren (473). He walked to his car, which was parked nearby, and drove out of Nyack (476).

In the Village of Piermont, he came to a rise in the road where there was also a curve (485). This was about one-quarter of a mile from the point of the accident (695). The elevation was such that, coming up one side of the hill, one could not see the road on the other side (695). Friedman brought his car almost to a full stop at that point to let another car which "straddled" the road back up sufficiently for him to pass and then drove ahead (485, 486). He then passed two cars in succession, going north, whose headlights temporarily blinded him (486, 648, 650). Nevertheless, he kept driving ahead, merely taking his foot off the accelerator (651, 652).

A battalion of soldiers, from Camp Shanks on a night-march, was moving along the highway at this point (375). Officers to the rear of the battalion had been stopping cars or slowing them down to pass around the marching men (382). When the officers saw Friedman approaching, they jumped and waved to him and

yelled to him to stop (382, 383, 575). Friedman kept right on and struck the rear of the column of men (384, 574, 606).

Friedman testified that, after being blinded by the headlights of the passing cars, all he knew was that he felt the impact of the accident (513, 699). Then he swerved to his left, stopped and got out of his car, saw what had happened, and drove his car off the road, a few feet away (521, 522). He walked back and saw a car standing with two women in it (489). At his request, the women loaned him the use of their car to go to Sparkill Police Headquarters, and he continued along for about a half mile when the "red" black-out siren sounded, requiring all traffic to stop (490, 491, 708).

Plaintiff Powell estimated that Friedman was going fifty to sixty miles per hour at the time of the accident (383). Friedman testified that he started from Nyack at twenty-five miles per hour and that, at the time of the accident, he was doing thirty to thirty-five miles per hour (477, 699).

The uncontrovertible physical facts bear out Powell's estimate. From the drug store in Nyack to the point of the accident was about four and one-half miles (658). Friedman had left the drug store a little after 9:28 P. M. when the first black-out alarm was sounded, had walked to his car, started up, driven along, slowed down to let the car on the road back up to let him pass, started up again, ran into the soldiers, stopped, and got out of his car, walked back to the women's car, secured its use from them, started up and drove another half mile until the "red" alarm at 9:37 P. M. This was all in nine minutes which most clearly indicates a speed of at least sixty miles per hour.

The condition of Friedman's car after the accident, with radiator and fender smashed as if it had struck a stone wall, also is proof of his tremendous speed (193, Exs. 8-A and 8-B). *Allen* v. *Stokes,* 260 App. Div. 600, 23 N. Y. S. (2d) 443.

To maintain such speed when, due to the hill, Friedman could see only a few feet ahead shows an utter disregard for the safety of persons who might be on the road on the other side of the hill. *Pfohl* v. *State,* 42 N. Y. S. (2d) 372. To keep moving at all when he was blinded by the headlights of the passing cars and did not know what was ahead of him, instead of stopping at the side of the road, in itself shows Friedman had no regard at all for what might happen, especially as he knew that troops from Camp Shanks might be on the road for a practice march (671, 672). The courts repeatedly have ruled that when one is thus blinded by headlights of passing cars, he must stop or slow down so that he may immediately stop. (*Freiere* v. *Kaufman,* 241 App. Div. 541, 272 N. Y. S. 316; *Scholing* v. *O'Connor,* 205 App. Div. 720, 200 N. Y. S. 797; *Budnick* v. *Peterson,* 215 Mich. 678; *Woodhead* v. *Wilkinson* (Calif), 185 Pac. 851; *Osbun* v. *De Young* (Court of Errors & Appeals, N. J.), 122 Atl. 809; *Jaquith* v. *Worden,* 73 Wash. 349; *Hammond* v. *Morrison,* 90 N. J. Law 15.

The truth of Friedman's statement that he was blinded and did not see the officers warning him to stop, or the soldiers moving ahead of him, has been assumed. Manifestly, if he saw them or heard the yells to stop, his conduct was tantamount to deliberate assault.

War measures such as the New York War Emergency Statute, Section 40, should not be construed so as to grant immunity to persons who act recklessly and with disregard and heedlessness of the safety of others.

Section 40 of the New York War Emergency Statute provides that no person who is "in good faith, carrying out, complying with, or attempting to comply with any law or duly promulgated rule, regulation or order * * * relating to civilian protection shall be liable for any injury or death to persons or damage to property as the result of such activity".

The question presented is whether such statute should be extended to conduct such as the jury could have found Friedman had been guilty of, which displays a "what do I care what happens" attitude on the part of the one carrying out a war order and thus a complete disregard of the safety of others, especially when the statute requires "good faith" as a condition of immunity. Like provisions, requiring "good faith" as a condition of immunity, are found in other State War Emergency statutes. See e.g. *Laws, New Jersey,* 1942, Ch. 251, Sec. 20, p. 690; N. J. Rev. Stat. A. Ch. 9-52.

The phrase "in good faith" is properly to be given effect, for words in a statute are not to be rejected as superfluous. *Platt* v. *Union Pacific R. R. Co.,* 99 U. S. 48, 58; *Palmer* v. *Van Santvoord,* 153 N. Y. 612, 616.

The phrase "in good faith" obviously does not mean that the person shall honestly believe he is carrying out some order for civilian defense. Though he so believed, if he was in error, and, for example, was responding to what he supposed was an air-raid signal,

when none had been given, it is clear he would not come within the protection of the statute. Fairly construed, the words refer to the person's conduct while he is in fact carrying out an order for civilian protection, and not to an honest intent to respond to some such order. A reckless and wanton disregard for the safety of others properly may not be deemed good faith, for the utilization of an "alert" as an excuse for a "what do I care what happens" attitude in driving a car clearly is not acting "in good faith".

In interpreting other statutes, unreasonableness has been held equal to lack of good faith. *Fidelity Assurance Assn.* v. *Sims*, 318 U. S. 608, 618.

In the Law of defamation, malice includes "such a wanton and reckless disregard of the rights of another as is ill will's equivalent". *Pecue* v. *Collins*, 204 App. Div. 142, 197 N. Y. S. 835; *Crane* v. *Bennett*, 177 N. Y. 106, 114, 115; *De Voy* v. *Irish World, etc., Inc.*, 208 App. Div. 319, 203 N. Y. S. 369; *Sutphin* v. *New York Times Co.*, 138 App. Div. 487, 122 N. Y. S. 833, aff'd 203 N. Y. 645.

The proof warranted a finding that Friedman was guilty of driving recklessly, in disregard of the rights of others who might be upon the road and such conduct is not simple negligence but constitutes the criminal offense of reckless driving. *New York Vehicle & Traffic Law*, Sec. 58; *People* v. *Grogan*, 260 N. Y. 138; *People* v. *Gardner*, 255 App. Div. 683, 8 N. Y. S. (2d) 917. In *District of Columbia* v. *Colts*, 282 U. S. 63, this Court pointed out that the act of reckless driving is "*malum per se*" and was "an indictable offense at common law" and it "cannot be described otherwise than as a grave offense".

The general rules of statutory interpretation support a construction which precludes such reckless misconduct from the coverage of the statute.

Section 40, being in derogation of the common law, is strictly to be construed so as to change the common law no further than required. *Shaw* v. *Railroad Company*, 101 U. S. 557; *Transit Commission* v. *Long Island R. R. Co.*, 253 N. Y. 345.

Statutes likewise are to be interpreted so as to avoid unwise, injurious, absurd, unjust or inconvenient results. *Hagger Co.* v. *Helvering*, 308 U. S. 389; *Sorrels* v. *United States*, 287 U. S. 435; *Lake Shore & Michigan Southern R. Co.* v. *Rouch*, 80 N. Y. 340; *Jewish Hospital of Brooklyn* v. *Doe*, 252 App. Div. 581, 300 N. Y. S. 1111.

To interpret a statute passed for the protection of the civilian population during war times as giving immunity, for example, to air-raid wardens who drive their automobiles in complete disregard of the safety of others, would be a palpable absurdity, especially in view of the rule that emergency vehicles, like all others, must exercise care. *Van Ingen* v. *Jewish Hospital*, 182 App. Div. 10, 169 N. Y. S. 412, aff'd. 227 N. Y. 665; *Farrell* v. *Fire Insurance Salvage Corps*, 189 App. Div. 795, 179 N. Y. S. 477; *Muhs* v. *Fire Insurance Salvage Corps*, 89 App. Div. 389, 85 N. Y. S. 911; *Miller* v. *City of Albany*, 158 Misc. 720, 287 N. Y. S. 889, aff'd. 247 App. Div. 848, 286 N. Y. S. 326.

Order No. 17 of the New York State War Council (857-861) itself demonstrates that reasonableness of conduct properly is the test of "good faith" under Section 40 when the operation of a motor vehicle is involved. That order first sets a limit of thirty-five miles per hour for any distance over a quarter of a mile; it then

provides that this limit is not applicable to vehicles driven in an emergency for the protection of life, health or public safety "provided that this paragraph shall not be so construed as to authorize any such motor vehicle to be driven or operated at a rate of speed in excess of that which is reasonable under conditions prevailing at such time".

Unquestionably, the promotion of the war effort is of paramount importance during time of war. Nevertheless, it would seem proper, as plaintiffs requested the District Court to charge the jury (840), to draw a line at some point under a statute such as that herein and not grant a blanket immunity to persons carrying out measures enacted for the protection of the civilian population, even though they are proceeding in complete disregard of the safety of others. This is the view taken by Judge Clark in his dissenting opinion. This, likewise, appears to be the view taken by the Circuit Court of Appeals for the Second Circuit in *Gaglio* v. *City of New York*, 143 Fed. 2d 904. In that case the Court, ruling that the statute was a defense, distinguished *Jones* v. *Gray*, 267 App. Div. 242, 45 N. Y. S. (2d) 519, since in the *Jones* case "the air-raid warden was conducting himself so recklessly that there was sufficient evidence to support the jury's finding that he was not acting in good faith". The Court thus made the manner of conduct the test of good faith.

The Trial Court, as affirmed by the Circuit Court of Appeals, construed the statute as granting blanket immunity. The Trial Court's charge, in effect, was a direction of a verdict for defendants.

Whether a person has acted in good faith, in general is a question of fact for the jury. *Title Guarantee & Surety Co.* v. *Nichols*, 224 U. S. 346; *Rowe* v. *United States*, 164 U. S. 546; *Kelso* v. *Ellis*, 224 N. Y. 528.

The Court first charged the jury that plaintiffs must establish that Friedman had been negligent (772, 773, 776). Then he instructed them that Section 40 exonerated defendants from liability unless they also found he was guilty of lack of good faith in the performance of his duty (804-806). The Court then defined good faith as being faithful to one's duty or else honesty of purpose and intent (807, 808). He already had charged that there was no dispute as to Friedman's duty and obligation to report upon hearing the "blue" signal (783, 784) so that the charge withdrew from the jury the issue of whether Friedman had not so recklessly disregarded the safety of others on the road that he could not have been deemed to have acted in good faith though he honestly intended to respond to the "alert" signal and it amounted to the direction of a verdict for defendants. The Court further erroneously refused to charge, upon plaintiff's request, that the statute would not grant defendants the privilege to operate a motor vehicle without regard for the safety of persons upon the highway or in a dangerous, reckless or wanton manner (830, 839, 840).

The charge and the refusal to charge were reversible error since they withdrew from the jury's consideration a material issue of fact. *The City* v. *Babcock*, 3 Wall.

240, 244; *Bank of Leavenworth* v. *Hunt*, 11 Wall, 391. The proof fairly presented the question of whether Friedman was acting in good faith in view of the reckless manner in which he was driving and the charge was error since it was equivalent to the direction of a verdict. *United States* v. *Murdock*, 290 U. S. 389, 394; *Best* v. *District of Columbia*, 291 U. S. 411, 4[illegible].

The charge permitted the jury to find for defendants though they could have found that Friedman ran down plaintiffs in reckless disregard of their rights. The result reached therefore may be sustained only if the statute exempts persons from liability in such a situation and, properly construed, it does not so do. *Viereck* v. *United States*, 318 U. S. 236.

The construction of the statute adopted below creates doubt as to its constitutionality and such construction should be avoided if possible.

The question appears not to have been squarely passed upon but in sustaining the validity of the New York Workmen's Compensation Law, this Court expressed the view that it is doubtful whether a legislature may destroy the common-law action in negligence for personal injuries without providing some adequate substitute. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 201, 205.

Because a statute is a war measure does not free a legislature from constitutional restrictions. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Sutherland* v. *Mayer*, 271 U. S. 272, 288.

To extend Section 40 to acts of wanton recklessness, as the Courts below did, would appear to make the statute violate the due process clause. In *Twining* v. *New Jersey*, 211 U. S. 78, 101, this Court ruled: "The

words 'due process of law' were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard."

To the same effect, see: *United States* v. *Cruikshank,* 92 U. S. 542, 544.

Furthermore, due process requires that a law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia* v. *New York,* 291 U. S. 502, 525, 539; *Treigle* v. *Acme Homestead Association,* 297 U. S. 189, 197.

It may be assumed for the argument that the legislature validly could exempt a person from liability for simple neglect while responding to some war order.

Heedlessness and recklessness, however, involve more than ordinary negligence. *Olefsky* v. *Ludwig,* 242 App. Div. 637, 272 N. Y. S. 158; *District of Columbia* v. *Colts,* 282 U. S. 63. There clearly is no need for exempting persons from acts of criminal recklessness whereby the safety of the community is endangered and the act would appear to violate the due process clause were it extended to such conduct, even though it were valid in respect of simple negligence. The statute was passed for the protection of citizens who remained in this country during war time and assuming *arguendo,* that the States retain any power to enact legislation for the promotion of the war effort, and, that such power is not exclusively in the Federal Congress, under United States Constitu-

tion, Article I, Section 8, the whole purpose of the legislation would be frustrated if its immunity was extended to that point where air-raid wardens and others could use defense orders as an excuse for proceeding in utter disregard of the safety of others.

The result below thus violates the rule that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score". *United States* v. *LaFranca*, 282 U. S. 568, 575; *I. C. C.* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 40.

POINT II.

The Trial Court committed numerous other errors in his instructions to the jury.

The Issue of Contributory Negligence

The men had been ordered by their commanding officers to march three abreast on the right side of the road and, of course, had to obey orders (312, 314, 322-324). On the night in question, they were so marching in accord with their orders (364, 413).

New York Vehicle & Traffic Law, Sec. 85 (6) provides that pedestrians on the traveled part of a roadway "shall keep to the left of the center line thereof * * *". The Court first correctly charged that because the men were on the right side of the road, could not be deemed contributory negligence since they were soldiers marching under orders (768, 769). The effect of the correct charge was, destroyed by the next in-

struction that the jury might "consider the fact that they were on the so-called wrong side of the road in determining the question of negligence of Friedman, the driver of the automobile. That is, I mean the circumstances whether he expected to find someone there. That would only go to the question of his neglect, if any" (770).

The purpose of Section 85 (6) is that pedestrians shall face traffic approaching them so as better to care for their safety. *Tedla* v. *Ellman,* 280 N. Y. 124.

Friedman knew that men from Camp Shanks were accustomed to taking night marches (672) and he could have "expected" to find men marching to the north as well as to the south, as was the battalion here. Men moving north, and on the left of the road, in compliance with the statute, would have been in front of him exactly as were the men herein except that their faces, instead of their back, would have been towards him. That the battalion was on the "wrong side" of the road, had no bearing upon how Friedman conducted himself and so had none on the question of his neglect for, so far as his conduct is concerned, the accident would have occurred whether the men on the road had their faces or backs to him.

That the men were on the "wrong" side of the road did not affect Friedman's obligation to use due care. *Shuman* v. *Hall,* 246 N. Y. 51; *Lee* v. *City Brewing Corp.,* 279 N. Y. 380, 389. Friedman's ability to see the men ahead of him was not affected by the fact that they happened to have their backs and not their faces towards him.

The only issue, as to which direction the men were facing relates, is whether they would have seen Friedman in time to avoid the accident had they been fac-

ing the other way, so that the side of the road on which they were marching can go only to the issue of their own and not of Friedman's negligence. It was, therefore, error to permit the jury to consider the statute in connection with Friedman's negligence. *Cohen* v. *A. Goodman & Sons,* 189 App. Div. 209, 178 N. Y. S. 528.

The men were soldiers, obligated to march as they were instructed, and so in this case the statute could not be considered in respect of the men's alleged contributory negligence.

The charge furthermore was error since the jury may well have found that Friedman, in the exercise of due care, should have seen the officers in the rear of the column waving and shouting to him to stop. The charge, therefore, violated the rule that one is under a duty to look where he is going. *McDade* v. *International Ry. Co.,* 235 N. Y. 11; *Herbert* v. *W. H. Smith Paper Corp.,* 243 A. D. 260, 276 N. Y. S. 820.

And, had the jury found that Friedman knew of the presence of the men then, even assuming the plaintiffs were negligent, the charge was erroneous for it violated the rule that one who becomes aware of another's peril and has the last clear chance to avoid an accident by using reasonable care is liable although the injured party put himself in the place of danger through his own neglect. *Storr* v. *N. Y. Central R. R.,* 261 N. Y. 348, 351.

The Additional Charge on Contributory Negligence

The Court further charged that if plaintiffs "were guilty of contributory negligence, they cannot recover" (774).

The only fact shown which could form any possible basis for a finding of contributory negligence, was that the men were marching on the right side of the road. There is nothing to show they had any opportunity to see or hear Friedman in time to avoid the accident. The charge, even though it may correctly state the general rule of law, is error for instructions never should be given on a hypothetical or abstract proposition on which there is no proof. *Heines* v. *McLaughlin,* 135 U. S. 584, 598; *Bryan* v. *United States,* 1 Black 140.

To first charge that a violation of Section 85 (6) was not contributory negligence and then give a conflicting instruction by leaving the question of contributory negligence to the jury when the violation of that statute was the only possible basis for a finding of contributory negligence necessarily must have misled and confused the jury and for that additional reason the charge was error. *United States* v. *Local 807,* 315 U. S. 521, 539; *Schutz* v. *Jordan,* 141 U. S. 213; *Rea* v. *Missouri,* 84 U. S. 532, 533.

The Effect of New York General Municipal Law, Section 50c

Friedman pleaded a cross-complaint against the Town of Orangetown under New York General Municipal Law, Sec. 50c (104-109). That section provides that every municipality "shall be liable for and shall assume the liability to the extent that it shall save harmless any duly appointed policeman or fireman * * * for the negligence of such appointee in the operation of a vehicle upon the public streets or highways of the municipality in the discharge of a statutory duty * * *".

The Court, referring to this statute, charged "this law makes the City, Town or Village liable for the

negligence of the policeman or fireman and exonerates and exempts the police officer even though he be negligent" (783). The Court further charged that Friedman and the Town would be liable to plaintiff for any negligence but coupled this with the proposition "that Friedman would not be required to pay the judgment but he could look to the city or the town in this instance for payment. That is, the town would save and hold him harmless" (784, 785).

While the statute gives a police officer a right to exoneration against a municipality, it does not relieve him from liability to a person he has injured by his negligence and he and the municipality are jointly and severally liable to the injured party. *Diamond* v. *City of New York,* 264 A. D. 342, 35 N. Y. S. (2d) 377.

The seriousness of the error in the charge is apparent. The language was such that the jury was bound to find for Friedman even though they found he was negligent, that he was acting in bad faith, and that plaintiffs were not contributorily negligent, for they were instructed that the statute "exempts" the officer. The subsequent instruction that the Town and Friedman would be liable to plaintiffs for negligence could not suffice to overcome the error, especially since it was coupled with the erroneous instruction "that Friedman would not be required to pay the judgment" so that any jury, in all probability, would feel that it would be senseless to render a verdict against him. In effect, they were directed to find for Friedman and were likewise bound to find for the Town, for a verdict for the officer and against the Town would have been inconsistent and improper. *Frascone* v. *Louderback,* 153 App. Div. 199, 138 N. Y. S. 370, aff'd. 208 N. Y. 631.

The Burden of Proof as to Friedman's Good Faith

The Court first charged that plaintiffs could recover only if Friedman was guilty of lack of good faith and that "the burden of proof of showing the absence of good faith is on the plaintiffs" (806). This was error as the one pleading an affirmative defense which asserts he has acted in good faith has the burden of so proving. *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397, 403.

After the completion of the charge, the following occurred: Mr. Mack: "There is a correction to your Honor's charge and it is merely a correction * * * your Honor said in substance that the burden of proof of absence of good faith is on the defendant and what your Honor meant to say was the burden of proof of good faith was on the defendant". The Court: "Yes, of course. The defendant must prove good faith. I thought I had said that. Of course that is so, if I did state otherwise" (825).

The Court thus "corrected" an instruction which had not been given and then gave a proper instruction. Such inconsistent instructions which tend to mislead or confuse the jury are error. *Deserant* v. *Cerillos Coal R. R. Co.,* 178 U. S. 409, 420; *District of Columbia* v. *McElligott,* 117 U. S. 621, 630.

The Undue Emphasis Placed Upon the Fact That Friedman was Responding to an Air-Raid Alarm Signal

The Court, pointing out that Friedman was responding to an air-raid signal, charged "and for aught he knew, according to the evidence, or for aught anyone

knew, it might have been a real raid; the Japanese and Germans might have been overhead * * *. But just assuming that we were attacked overhead by airplanes and had not had any previous drills, can you imagine the amount of panic, riot, death, injuries that would occur? * * * I believe from this evidence that there was nothing to determine whether the officer knew it was a real black-out or whether it was merely a practice black-out" (787, 789).

Friedman did testify that he did not know whether the signal to which he was responding was "for a real black-out or a practice black-out" (645). It is hard to believe, however, that in November, 1943, he was driving along in the belief that Japanese or German airplanes were overhead, about to raid upper New York State. Whether he did so believe, at best, was for the jury, and the phrasing of the charge was such that it failed to leave that issue with the jury. *United States* v. *Murdock,* 290 U. S. 389.

The charge, furthermore, amounted to a summation by the Court on behalf of defendants and violated the rule that it is the duty of the trial judge, in expressing opinion on the evidence, to in no way mislead and especially not to be one-sided. *Quercia* v. *United States,* 289 U. S. 466, 470; *Rio Grande Western Railway Co.* v. *Leak,* 163 U. S. 280.

In the Court below defendants urged that plaintiffs had not at the trial properly raised the questions of the errors in the Court's charge referred to herein so that they were not the subject of review.

The doctrine in respect of the need of raising points at the trial, to entitle a party to review errors, is one of discretion and the Appellate Courts have the power to review errors though the point has not been raised

below. *Washington Railroad* v. *Bradley,* 10 Wall. 299; *American Legion Post No. 90* v. *First National Bank & T. Co.,* 113 Fed. (2d) 868; *Stoltz* v. *United States,* 99 Fed. (2d) 283. This rule applies to errors in a charge as to others. *Delaware & H. R. Corporation* v. *Cottrell,* 69 Fed. (2d) 195.

It is held therefore that plain errors will be noticed and corrected despite a failure to raise a proposition in the Court below. *Stromberg Motor Devices Co.* v. *Zenith-Detroit Corp.,* 73 Fed. (2d) 62.

This is especially the case in regard to a plain error when there has been a clear injustice. *Hormel* v. *Helvering,* 312 U. S. 552; *Pierce* v. *United States,* 255 U. S. 398; *United States* v. *Tennessee & Coosa R. Co.,* 176 U. S. 242; *Helvering* v. *Rubenstein,* 124 Fed. (2d) 969; *Trapp* v. *Metropolitan Life Insurance Co.,* 70 Fed. (2d) 976; *Ayers* v. *United States,* 58 Fed. (2d) 607.

This rule applies to errors in a charge as to other errors. *O'Connor* v. *Ludlam,* 92 Fed. (2d) 50; *Fricke* v. *General Accident Fire & Life Assurance Corp.,* 59 Fed. (2d) 563; *Feldmann* v. *Connecticut Mutual Life Ins. Co.,* 142 Fed. (2d) 628; *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama,* 140 Fed. (2d) 13.

Likewise, it is the rule when, as in this case, issues have been disposed of or a case has been submitted to a jury upon a fundamentally erroneous theory, that there is no need to take exception, upon the theory that to have so done would have been futile. *Railroad Company* v. *Reeves,* 10 Wall. 176, 189; *Fourth National Bank* v. *Francklyn,* 120 U. S. 747, 751; *Sacks* v. *Stecker,* 60 Fed. (2d) 73; *National Fire Insurance Co.* v. *School District No. 68,* 115 Fed. (2d) 232; *Sweeny* v. *United Feature Syndicate,* 129 Fed. (2d) 904.

POINT III.

The Trial Court improperly interfered with plaintiffs' counsel's presentation of the case.

Throughout the trial, the Court displayed impatience with plaintiffs' counsel and continually interfered with his presentation of the case, and the Court's interruptions were such as to repeatedly indicate to the jury that he believed plaintiffs' counsel was asking improper questions, even though no objection had been made by defendants' counsel. See e.g. 161, 162, 165, 209, 240, 248, 306, 312, 313, 316, 365, 368, 369, 391, 425, 437 443, 447, 455, 705.

The Court, furthermore, permitted counsel for the Town of Orangetown repeatedly to interrupt and to break in upon plaintiffs' counsel's questioning of witnesses. See e.g. 161, 170, 171, 172, 175-180, 239, 285-287, 443.

The Court's interruptions interfered with the presentation of plaintiffs' proof and it is error thus repeatedly to interfere with counsel's presentation of a case. *Sprinkle* v. *Davis*, 111 Fed. (2d) 925.

The Court's attitude herein, moreover, as reflected by his interruptions, necessarily must have affected the jury to plaintiffs' prejudice.

POINT IV.

Counsel for the Town of Orangetown improperly appealed to the jury's prejudice in his summation.

In his summation, counsel for the Town of Orangetown stated: "And when you say, 'who is going to pay these boys?', the answer is 'the United States Government'." (754).

Objection was at once taken and the propriety of the objection was recognized both by the Court and defendant's counsel (755). Nevertheless, counsel continued, after referring to the fact that Friedman was driving on a practice black-out and that "it might have been real, he might have saved thousands of lives", and after referring to the War Emergency Statute that "if you find both were acting sincerely, then under our statute it quite naturally follows that all you have to do, as I see it, is to relegate these boys to the great and glorious government under which we live, to make such provision and such compensation for them as the great government of the United States, in its majesty, in its wholeheartedness and in its sincerity, should make for their rehabitation" (756-758).

Such arguments, which are not fair comment on the evidence and have the purpose and effect of influencing the jury by appealing to passion or prejudice, are reversible error. *Viereck* v. *United States*, 318 U. S. 236; *Berger* v. *United States*, 295 U. S. 78; *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310.

In the Court below, defendants urged that plaintiffs

had waived the error in counsel's summation by not asking for a mistrial. But objection to the argument duly was made and indeed it is the Court's duty, irrespective even of an objection, to prevent appeals to the passions or prejudices of the jury. *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310. Thus, even though no objection has been taken to the summation, a judgment will be reversed when a verdict has been the result of appeals to the passions or prejudices of a jury. *Metropolitan Life Insurance Co.* v. *Banion*, 106 Fed. (2d) 561.

POINT V.

The War Emergency Statute is no defense to the action for the death of Smith.

New York State Constitution, Art. I, Sec. 16, provides:

> "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

The New York Courts rule that this provision takes from the Legislature the power to abrogate the common law remedy for injuries resulting in death without supplying a substitute remedy. *Warren* v. *Morse Dry Dock & Repair Co.*, 235 N. Y. 445, 448; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 111; *Hanke* v. *New York Consol. R. Co.*, 181 App. Div. 53, 168 N. Y. S. 234; *Travelers Insurance Co.* v. *Padula Co.*, 224 N. Y., 397, 406; *Rosin* v. *Lidgewood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. S. 49; *Medinger*

v. *Brooklyn Heights R. Co.*, 6 App. Div. 42, 39 N. Y. S. 613; *O'Reilly* v. *Utah, Nevada & California Stage Co.*, 87 Hun. 406, 34 N. Y. S. 358.

It follows that Section 40 of the War Emergency Statute is ineffective so far as concerns the cause of action for the death of Smith and that it was improper to permit the jury to consider the statute in connection with that cause of action.

CONCLUSION

It is respectfully submitted that the writ of certiorari prayed for should be granted, since the question here involved is not merely of interest to the litigants, but rather of great general importance. Therefore there is presented a proper occasion for the exercise of the supervisory power of this Court.

Respectfully submitted,

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